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T.M., Appellant)	
)	
and)	Docket No. 15-335
)	Issued: May 15, 2015
DEPARTMENT OF ENERGY,)	
ALBUQUERQUE OPERATIONS OFFICE,)	
Albuquerque, NM, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On November 24, 2014 appellant filed a timely appeal from a November 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss and compensation benefits effective November 5, 2014 as he no longer had any residuals or disability causally related to his accepted employment injuries.

² The Board notes that appellant submitted additional evidence following the November 5, 2014 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

FACTUAL HISTORY

This case was previously before the Board. In a decision dated July 12, 2000, the Board found that OWCP had not met its burden of proof to reduce appellant's compensation based on his capacity to earn wages as a duplicating machine operator.³ The Board reversed OWCP's June 18 and August 11, 1998 decisions. Following the Board's decision, OWCP reinstated appellant on the periodic rolls for temporary total disability with a date-of-injury pay rate of \$435.60 per week. The facts and circumstances of the Board's July 12, 2000 decision are incorporated herein by reference. The relevant facts for this case are set forth below.

OWCP accepted that on September 24, 1984 appellant, then a 44-year-old printer, sustained injuries to his back when a bolt on his chair broke and he fell down in the performance of duty. Appellant stopped work.⁴ OWCP accepted his claim for sprain of the back, lumbar region and aggravation of degenerative disc disease of the lumbar region. It paid medical and wage-loss compensation benefits.

By decision dated April 2, 2001, OWCP reduced appellant's compensation benefits based upon his actual earnings of \$320.00 per week effective January 25, 1999 in his new position of bindery technician.

Pursuant to his requirement, under Form EN1032, to obtain annual medical reports, appellant sought medical treatment with Dr. Richard T. Radecki, Board-certified in physical medicine and rehabilitation. In his report dated January 24, 2002, Dr. Radecki related that appellant continued to have pain from his original injury, but he now had a secondary injury and additional pain.⁵ He stated that as appellant related that he had pain prior to the second injury, his federal work-related injury had not ceased and was now a chronic pain problem. Regarding appellant's disability status, Dr. Radecki related that appellant had significant movement limitations due to chronic pain. Therefore, it was unlikely that appellant could return to the job he held when injured. Dr. Radecki opined that appellant could perform sedentary, modified work and did not recommend a functional capacity evaluation, physical therapy, or surgery. In a report dated January 30, 2003, Dr. Radecki related that an x-ray evaluation showed significant degenerative disc disease at L5-S1 with forminal stenosis.

Appellant continued on partial disability. He was treated by Dr. Barry Hochstadt, Board-certified in internal medicine. By report dated January 25, 2005, Dr. Hochstadt related that appellant had moderate pain, and limited range of motion on flexion. He diagnosed chronic pain syndrome, which would not improve over time. Dr. Hochstadt opined that appellant could only perform light duty.

³ Docket No. 98-2582 (issued July 12, 2000).

⁴ On November 11, 1984 appellant was removed from his position due to a reduction in workforce.

⁵ In a letter dated August 2, 2002, OWCP informed appellant that his new injury which had been sustained on September 26, 2001, in private employment, was not compensable as it did not occur as a result of federal employment. Appellant continued to submit periodic medical reports to the record to support his continuing disability benefits.

By letter dated February 17, 2009, OWCP advised appellant to submit an updated, current medical report from his treating physician. In a report dated February 11, 2009, Dr. David R. Sears, Board-certified in internal medicine, related that appellant's current objective findings on examination were work related and included decreased range of motion on flexion and extension of both his lumbar and cervical spine. He opined that appellant had chronic pain syndrome and could not perform any work.

Dr. Patricia Carabajal, Board-certified in family practice, related on February 22, 2011 that on physical examination of appellant for the Department of Labor, he presented walking with a cane, and had decreased range of motion on flexion and extension of the back and neck. She opined that appellant had chronic neck and lower back pain, and was unable to work given his pain, as well as his limited range of motion and ability to walk. Dr. Carabajal recommended that appellant continue with analgesics as well as physical therapy. In a report dated February 14, 2014, she related that he had stable low back pain, hypertension, and insomnia.

On June 12, 2014 OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Keith W. Harvie, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of appellant's continuing disability related to his accepted employment-related injuries.

In his July 23, 2014 report, Dr. Harvie provided a history of appellant's accepted back injuries and noted his review of the medical records and the medical treatment he received. He noted that a March 18, 1998 magnetic resonance imaging (MRI) scan of the lumbar spine revealed moderate stenosis at C5-6 with spondylolisthesis in his cervical spine, primarily C5-6 and C4-5. Appellant had a history of diabetes and had previous gallbladder surgery. Dr. Harvie related appellant's current complaints of low back pain at the lumbosacral junction and problems sleeping because of the pain in his lower back, neck, and right upper arm. He noted that appellant had problems with activities of daily living. Upon examination, Dr. Harvie observed that appellant was nontender in the cervical spine except at the lumbosacral junction, in the lower back. Range of motion of the lumbar region demonstrated 10 degrees extension, right lateral, and left lateral and 45 degrees right and left rotation. Cervical range of motion revealed 20 degrees extension, 15 degrees right and left lateral, 40 degrees right rotation, and 45 degrees left rotation. Dr. Harvie stated that appellant was very stiff and did not try to move beyond the limits that he imposed. Straight leg raise testing was to 70 degrees bilaterally and negative in both the supine and sitting position for any pain within the legs. Dr. Harvie also reported negative femoral nerve stretch sign and positive Ely's sign with pain at the lumbosacral junction.

Dr. Harvie opined that appellant's accepted lumbar conditions had resolved and that he no longer suffered any residuals of his employment-related lumbar strain and aggravation of degenerative disc disease. He noted that appellant had disc degeneration of the cervical and lumbar spine and no current MRI scan or x-ray findings. Dr. Harvie explained that there was no tenderness in the sacroiliac (SI) joint, sciatica notch, posterior thigh, or posterior calf. He stated that appellant demonstrated exaggerated behavior in his accepted work conditions and pointed out that appellant scored a 115 on the pain disability questionnaire (PDQ). Dr. Harvie reported that appellant had no limitations resulting from aggravation of degenerative disc disease and that any limitations were due to deconditioning and obesity. He stated that appellant was capable of sedentary work only because he was in poor physical function due to nonactivity.

On September 17, 2014 OWCP proposed to terminate appellant's compensation and medical benefits based on Dr. Harvie's July 23, 2014 report which determined that appellant's employment-related injuries had resolved and that he was capable of returning to modified duty.

In a September 25, 2014 report, Dr. Ben Muneta, a family practitioner, stated that appellant had many severe medical conditions which could be exacerbated by performing even the most minimal physical exertions. He reported that appellant had severe low back pain with disc disease which limited his ability to do physical activities. Dr. Muneta noted that appellant also had diabetes, hypertension, and was prone to symptoms of hypoglycemia. He explained that because of appellant's age and medical conditions he could not be considered to do tasks beyond the most minimal of physical exertions.

By decision dated November 5, 2014, OWCP finalized the termination of appellant's compensation and medical benefits effective November 5, 2014. It determined that the weight of the medical evidence rested with Dr. Harvie's July 23, 2014 report which determined that appellant's employment-related injuries had resolved and that he was capable of returning to sedentary duty.

LEGAL PRECEDENT

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.⁶ OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹⁰

ANALYSIS

OWCP accepted appellant's claim for sprain of the back, lumbar region and aggravation of degenerative disc disease of the lumbar region. Appellant stopped work. OWCP paid disability and medical benefits for partial disability under a wage-earning capacity decision. By decision dated November 5, 2014, it terminated appellant's compensation and medical benefits based on the July 23, 2014 second opinion report of Dr. Harvie which concluded that appellant's

⁶ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁸ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹⁰ *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, *id.*

accepted conditions had resolved and that he was no longer disabled due to the accepted September 24, 1984 employment injury. The Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits.

OWCP referred appellant's claim to Dr. Harvie for a second opinion examination to determine whether appellant continued to suffer residuals of his accepted injuries and the necessity of his medical treatment. In a July 23, 2014 report, Dr. Harvie reviewed appellant's history of injury, medical treatment, and the statement of accepted facts concerning his back injuries. He reported essentially normal findings on physical examination and opined that appellant no longer had any residuals or disability due to his accepted September 24, 1984 employment injury. Dr. Harvie noted that there was no tenderness in the SI joint, sciatica notch, posterior thigh, or posterior calf. He stated that appellant demonstrated exaggerated behavior in his accepted work conditions. Dr. Harvie reported that appellant had no limitations resulting from aggravation of degenerative disc disease and that any limitations were due to deconditioning and obesity. He stated that appellant was capable of sedentary work only because he was in poor physical function due to nonactivity.

The Board has held that the weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.¹¹ In this case, Dr. Harvie discussed the history of injury and explained that there were no objective findings to establish that appellant had any continuing employment-related residuals or disability. The Board finds that his opinion is detailed, well rationalized, and based upon a complete and accurate history. Therefore, the Board finds that Dr. Harvie's opinion represents the weight of the medical evidence and establishes that appellant no longer had any residuals or disability from his accepted back injuries.

The Board further finds that the medical evidence appellant submitted is of limited probative value in disputing Dr. Harvie's report. Prior to the termination of benefits appellant was seen by Drs. Radecki, Hochstadt, Sears and Carabajal who continued to diagnose chronic pain syndrome and opine that appellant was at least partially disabled. However, the Board notes that none of these physicians provided objective findings that appellant's accepted conditions caused continuing residuals or disability.

Following OWCP's September 17, 2014 notice of proposed termination of benefits, appellant submitted a September 25, 2014 report by Dr. Muneta, who reported that appellant had severe low back pain with disc disease which limited his ability to do physical abilities. Dr. Muneta also noted that appellant also had diabetes, hypertension, and was prone to symptoms of hypoglycemia. He explained that because of appellant's age and medical conditions appellant could not be considered to do tasks beyond the most minimal of physical exertions. Although Dr. Muneta attributed appellant's inability to work to his low back pain and disc disease and noted that he suffers from diabetes, hypertension, and hypoglycemia. He failed to explain, based on medical rationale, how appellant was unable to work as a result of his

¹¹ See *K.W.*, 59 ECAB 271 (2007); *Ann C. Leanza*, 48 ECAB 115 (1996).

accepted lower back sprain and aggravation of disc disease. The Board has found that medical evidence which provides only a conclusion but does not offer any rationalized medical explanation is of limited probative value.¹²

On appeal, appellant alleges that Dr. Harvie was very unprofessional and that he experienced a lot of pain during the second opinion examination. Despite his allegations, appellant has not provided any objective evidence to support that his pain is a result of his accepted conditions.

Accordingly, OWCP has met its burden of proof to establish that appellant no longer continues to suffer residuals of his accepted September 24, 1984 back injury. There is no medical evidence contemporaneous with the termination of his benefits which supports that he has any continuing residuals related to his accepted lumbar conditions. Accordingly, the Board finds that OWCP properly terminated appellant's rights to compensation and medical benefits.

Appellant had received a loss of wage-earning capacity determination on April 2, 2001. The Board has held that once a loss of wage-earning capacity is determined, it remains in place unless modified.¹³ A modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.¹⁴ In certain situations, however, if the medical evidence is sufficient to meet OWCP's burden of proof to terminate benefits, the same evidence may also negate a loss of wage-earning capacity such that a separate evaluation of the existing wage-earning capacity determination is unnecessary.¹⁵ OWCP's burden to demonstrate no further disability is effectively the same, irrespective of whether there is an existing determination in place finding loss of earning capacity. Case law may suggest that a threshold evaluation of the wage-earning capacity needs to be performed before there is a termination of benefits. The Board finds, however, that the burden is often substantially the same, the evidence is the same and the process of terminating benefits need only be done once. While a claimant may still have unrelated medical conditions or impairments, the medical evidence must establish that the employment-related disability and medical conditions no longer exist.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹² *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006). See *T.C.*, Docket No. 12-444 (issued August 1, 2012); see also *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ A wage-earning capacity determination remains in effect until it is properly modified. See *Katherine T. Kreger*, 55 ECAB 633 (2004); see *P.Y.*, Docket No. 09-2293 (issued September 1, 2010) and *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹⁴ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹⁵ *A.P.*, *supra* note 13.

CONCLUSION

The Board finds that OWCP met its burden of proof to justify termination of appellant's medical benefits effective November 5, 2014.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board